Supreme Court, U.S.
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No. 96-4

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

DEBRA ROWINSKY, for herself and as next friend of "JANE DOE" and "JANET DOE," her minor children, and for all those similarly situated,

Petitioner,

vs.

BRYAN INDEPENDENT SCHOOL DISTRICT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

May a female middle school student sue her school district for money damages under Title IX based on allegations that she was harassed by boys at school, when the summary judgment evidence shows that school officials disciplined the boys who allegedly harassed her and there is no evidence that school administrators responded to complaints of student harassment in an intentionally discriminatory manner?

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Bryan Independent School District, respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the Fifth Circuit's decision in this case. That decision is reported at 80 F.3d 1006.

RESPONSE TO PETITION'S "INTRODUCTION"

The Petition's Introduction and Question Presented presume, erroneously, that the courts below found that the Bryan Independent School District (Bryan ISD or District) was aware of "severe and pervasive" student-to-student harassment and that it refused to take corrective action in response to known complaints. This case is on appeal from the district court's decision to grant the Bryan ISD's motion for summary judgment. The record shows that Jane and Janet Doe complained about three boys and that all three boys were punished. While Petitioner asserts that the punishment was inadequate, the district court found that she failed to raise a fact issue showing that her daughters' gender influenced the District's response to their complaints.

In affirming the summary judgment, the Fifth Circuit scrutinized the legislative history and language of Title IX and the statute's origin under the Spending Clause and concluded that Congress did not intend to hold school districts financially responsible for the conduct of non-agent adolescents. Consistent with this Court's prior decisions, the Fifth Circuit properly held that students seeking money damages from their schools for student-to-student harassment must show intentional discrimination by the school district itself, not negligent discipline. Absent evidence of intentional discrimination, the judicial inquiry under Title IX ends, even if a court believes that the school district could have done more. The Fifth Circuit's holding is consistent with this Court's previous admonishments that the federal courts not interfere with the implementation of school disciplinary rules.

Although a divided panel of the Eleventh Circuit has held that school districts may be held monetarily liable in cases of student-to-student harassment, that decision has been

vacated, and thus there is no circuit court decision in conflict with the Fifth Circuit. Likewise, the Fifth Circuit decision does not conflict with any regulations of the U.S. Department of Education, which, to date, has not promulgated a single Title IX regulation on sexual harassment. Petitioner's argument that a conflict exists is based on a 1992 "letter finding" of a regional office of the Department of Education's Office of Civil Rights (OCR) following an investigation of another school district. The letter states that a district may be found in "noncompliance" if it fails to respond "adequately" to incidents of student-to-student harassment. Such case-specific letter findings are accorded little, if any, deference by the courts. Further, an OCR decision of "noncompliance" is irrelevant to the question of whether damages can be awarded in a lawsuit. Prior decisions of this Court show that noncompliance may be the result of unintentional discrimination, for which no damages may be had.

Contrary to the Petition, *Rowinsky* will not leave female students in the Fifth Circuit without protection "from debilitating peer harassment." School districts may lose their federal funding, may be investigated by the OCR, and may be sued for damages where intentional discrimination by the school district is established. Students also may file criminal charges against or sue their perpetrators.

Petitioner argues that Title IX *should* permit a damages action based on the acts of non-agent juveniles. However, Congress, not this Court, should decide this question of policy. The legal question before this Court is whether the Petitioner, in response to the motion for summary judgment, presented evidence raising an inference of discrimination, based on sex, by the Bryan ISD. Given the evidence in the record and the determination of the courts below based on that evidence, the Court should deny the petition.

STATEMENT OF THE CASE

Proceedings Below

The Petitioner filed this lawsuit on November 9, 1993. The Petitioner asserted numerous claims, including a claim under Title IX of the Education Amendments of 1972. The Bryan ISD filed a Rule 12(b)(6) motion to dismiss. The district court declined to dismiss the Title IX claim and ordered a more definite statement. The Petitioner amended, and the parties engaged in discovery during which the school district produced hundreds of documents reflecting student discipline patterns. The Bryan ISD then moved for summary judgment on all remaining claims. The motion was granted as to Petitioner's damages claims. With respect to the claim for injunctive relief, the district court found that the request was moot because Jane and Janet had moved out of the district and could not show a risk of future harm. (Pet. App. B-15 n. 9.) The Fifth Circuit affirmed the summary judgment.

The Petition does not question the Fifth Circuit's conclusion that Mrs. Rowinsky lacks standing to bring a claim on her own behalf. Similarly, the Petition does not discuss Petitioner's claim for injunctive relief; accordingly, the only question before the Court is whether Petitioner's claim for damages was properly dismissed.

Statement of Facts

Petitioner asserts that the Court must accept as true all facts alleged by the Petitioner in the record. This case is before the Court following the granting of summary judgment, not on the granting of a Rule 12(b)(6) motion to dismiss. The non-movant must do more than rest on her pleadings. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986). Once the party seeking summary judgment makes the initial showing,

negating any disputed material fact, the party opposed to the motion must offer affidavits or other evidence reflecting the existence of one or more genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

The Petition contains colorful, conclusory flourishes that are not evidence (*e.g.*, sexual harassment was "accepted norm" at Bryan ISD," Pet. at 9; Bryan ISD had an "arcane and chauvinistic view of blaming the victim," Pet. at 9-10). Under Rule 56, the district court properly went beyond the statements of counsel and examined the actual evidence submitted by both parties. The district court found that the Bryan ISD punished the three boys about whom Jane and Janet complained and that it replaced the school bus driver whose supervision of students allegedly was inadequate. The district court concluded that the Petitioner failed to raise a fact issue that the Bryan ISD discriminated against Jane and Janet on the basis of their sex or that it discriminated against girls in general.

Jane and Janet Doe were eighth grade students who rode a school bus to and from school. On the bus in question, girls and boys sat on different sides. Jane and Janet Doe frequently sat on the boys' side and received warnings from the bus driver, Bob Owens. Jane and Janet did not deny this fact in their affidavits. (R. Vol. 7 at 1368, 1362.)

In her summary judgment affidavit, Jane Doe alleged that, in September 1992, she told the bus driver that G.S. "was touching me and would not leave me alone." (R. Vol. 7 at 1368.) Likewise, Janet Doe's affidavit alleged that, during September, she "complained" to Mr. Owens "no less than eight separate times," but her affidavit does not describe the nature of the complaints. (R. Vol. 7 at 1361.) The only specific allegation in this portion of her affidavit is that she allegedly told the bus driver that G.S. had "swatted" Janet and Jane on the bottom and that G.S. had used "foul language." Jane and

Janet's affidavits prove that most of the alleged incidents, so dramatically described in the Petition, were never reported to the bus driver.

In late September, Jane Doe complained to the bus driver that G.S. "touched her over her heart" and on a "private part." (R. Vol. 3 at 665.) Mr. Owens spoke to G.S. and wrote up a discipline referral form. In the Bryan ISD, bus drivers do not assign discipline; the administrators at the school where the student is enrolled assign discipline. Mrs. Rowinsky also reported this same incident to Randy Caperton, the middle school assistant principal. Because G.S. attended the high school, not the middle school, Mr. Caperton referred Mrs. Rowinsky's complaint to the high school, which suspended G.S. from the bus for five days.[1] (R. Vol. 3 at 665, 669, 677, 726.) G.S. was warned that any future incidents would lead to "permanent suspension" and he was directed to sit away from the girls.

On December 16, 1992, just prior to the winter recess, the Petitioner complained about a different boy, L.H. Again, Mr. Owens wrote a disciplinary referral form, and discipline was assigned by L.H.'s principal. (R. Vol. 3. at 665.) The discipline was to be implemented after the holiday break. During the break, however, L.H. moved away and was no longer enrolled in the Bryan ISD. (R. Vol. 3 at 720.)

Mrs. Rowinsky called upon other school administrators, asking for Bob Owens to be removed and for G.S. to be permanently barred from the bus. One administrator, Jay Anding, called to verify that G.S. was disciplined; informed

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[1]Although school records show that G.S. was suspended for five days, the Petition and the Fifth Circuit both state that the suspension was for three days. Respondent acknowledges that this conflict must be resolved in Petitioner's favor under Rule 56 of the Federal Rules of Procedure.

Mrs. Rowinsky of the administrator to contact to appeal any disciplinary decision of G.S.; viewed videotapes of student conduct on the bus; replaced Mr. Owens with a female bus driver; spoke to the new bus driver about keeping G.S. apart from Mrs. Rowinsky's daughters; and gave Mrs. Rowinsky the phone number of Dr. Tom Purifoy, the Title IX coordinator. C.W. Henry, the transportation administrator, personally met with Mrs. Rowinsky and viewed videotapes of student conduct on the bus. The videotapes revealed students leaving their seats and acting up; no sexually assaultive-type conduct was observed. (R. Vol. 3 at 657.) Mr. Henry subsequently approved Mr. Anding's assignment of a new bus driver. The superintendent, Dr. Sarah Ashburn, met with Mrs. Rowinsky, reviewed the disciplinary action taken against G.S., determined that the response was appropriate, and responded by letter. The Title IX coordinator also met with Mrs. Rowinsky and assisted her in meeting with Mr. Henry.

Although Jane Doe alleges that G.S. continued to bother the girls after his suspension, as the district court noted, the girls admitted in their affidavits that they did not report any new concerns to Mr. Owens. Furthermore, as the district court noted, they never reported *any* further misconduct after the Bryan ISD assigned a new bus driver to the route. Indeed, review of the bus videotapes showed that student conduct improved under the new bus driver.

On March 30, 1993, a history teacher observed Jane Doe and a male student F.F. disrupting class. The teacher sent both students to an assistant principal, Sandra Petty, who spoke to the students and contacted their parents. Mrs. Petty determined that F.F. had popped Jane's bra strap after Jane told him that her bra was unfastened. (R. Vol. 3 at 673, 724.) Mrs. Petty suspended him for the remainder of that day and for the next day. His classroom seat assignment also was changed.

(R. Vol. 3 at 724.) F.F.'s mother complained that the punishment was too severe. Mrs. Petty met with Mrs. Rowinsky and described the punishment given to F.F. As the district court found, neither Jane nor Janet reported any further incidents with F.F.

The Petition states that, as a result of the above, Jane and Janet suffered an inability to concentrate and that their emotional and psychological well-being was adversely affected. (Pet. at 3.) Their affidavits, however, contain no such allegations.

In response to the school district's motion for summary judgment, the Petitioner argued that harassment of girls in general was ignored by the Bryan ISD. She argued that, of 112 incidents of "fighting" at the middle school, 108 resulted in short-term suspensions, while, of 108 incidents of "sexual harassment," only five students were suspended. However, many of the discipline referrals considered "sexual harassment" by the Petitioner involved non-assaultive acts and, appropriately, received a lesser penalty than fighting, for example:

> A student dropped his pants and "mooned" others. He received two days of detention. (R. Vol. 7 at 1235.)
>
> A student used the expression "jacking off." He received five days of in-school suspension. (R. Vol. 7 at 1227.)
>
> A student showed an obscene picture in class. He received two days of in-school suspension. (R. 1238.)

Some of the so-called "sexual harassment" incidents did result in suspension when physical contact was involved (*e.g.*,

touching breasts: five days; popping a bra strap: 1 ½ days suspension). Finally, some of the "fights" received a punishment less than suspension (e.g., pulling hair: student given a warning). The data on all incidents shows that both girls and boys who misbehaved were punished. (R. Vol. 7 at 1269-1137, 1117-1021.) The student's age and conduct--not his or her gender--determined the consequence.

The Petition also makes conclusory assertions about the alleged inadequacy of the Bryan ISD's policies and procedures. For example, while Mrs. Rowinsky asserts that she was not personally informed of her rights, the record shows that the school district gave all students and parents copies of the student code of conduct, which provides explicit information on student rights. The record also shows that the Bryan ISD maintained a grievance procedure for students to lodge complaints about any matter; designated a Title IX coordinator by name and described the grievance procedure for discrimination complaints; adopted policies prohibiting the use of profanity and vulgar language, verbal abuse, inappropriate physical contact, and harassment; and maintained policies prohibiting assault as defined in the Texas Penal Code. Finally, the district publicized its Title IX compliance efforts in the local newspaper; the clippings are part of the record. (R. Vol. 3 at 689, 696, 702, 706, 709, 714, 716, 805, 810, 816, 830-729.)

The Petition also inappropriately relies on an unofficial and unauthenticated investigation report by a regional office of the Office of Civil Rights that contains interviews with anonymous students. The Bryan ISD filed extensive written objections with the district court to the unauthenticated, unsworn hearsay evidence.[2] (R. Vol. 2 at 1538-1572.) Neither

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[2]Hearsay may not be used to generate an issue of fact. *See Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1541 (10th Cir. 1995); *Cormier v.*

the district court nor the court of appeals referred to the report in their opinions. The OCR report allegedly recorded 254 "sexual misconduct incidents," 94.1 percent of which resulted in documented sanctions, according to the report. The "sexual misconduct incidents" included a student's displaying of condoms, a male student's "mooning" the girl's choir, a male student's darting through the girl's locker room, and a female special education student's touching herself in class. These other allegations not only are hearsay, they are immaterial under Rule 56. Both lower courts properly focused on what Jane and Janet themselves personally experienced and whether the district--not fellow students--discriminated against Jane and Janet on the basis of their sex.

The Petition also contains allegations involving another Bryan ISD student, J.S. Like the OCR report, the allegations of J.S. are immaterial. This lawsuit was never certified as a class action, and neither Jane nor Janet knew J.S. or observed anything that happened to her. J.S. had preexisting emotional and family problems, including reported multiple personalities. She had documented problems with being disruptive and using obscene language, and school officials and counselors worked closely with her on her mental health and educational needs. Respondent's summary judgment affidavits showed that most of J.S.'s harassment allegations were never reported to school officials and that her specific complaints were appropriately addressed by school officials. (R. Vol. 3 at 848, Ex. 9.)

Pennzoil Exploration & Prod. Co., 969 F.2d 1559, 1561 (5th Cir. 1992).

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Fifth Circuit decision does not conflict with any prior decision of this Court.

In *Franklin v. Gwinnett County Public Schools*,[3] this Court held that money damages are recoverable under Title IX in cases involving allegations of intentional discrimination but not unintentional discrimination. The plaintiff in *Franklin* had alleged that an *adult* teacher allegedly pressured her into having sexual intercourse and that school administrators interfered with her right to pursue a Title IX charge. Her suit had been dismissed on the ground that money damages were not available under Title IX. This Court reversed, holding that damages are available in certain cases. The Court found that the plaintiff's allegations of intentional discrimination were adequate to defeat a Rule 12(b)(6) motion to dismiss. In dicta, the Court stated that "sexual harassment" of a student by an adult employee because of the student's sex can be a form of "sexual discrimination," citing *Meritor Savings Bank, FSB v. Vinson*,[4] an employment case under Title VII of the Civil Rights Act of 1964.[5] The Court did not compare Title IX and Title VII, did not define the standard of liability for acts of agents (much less non-agents), and never even used the phrase "hostile environment."[6] The Court specificaily declined to

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[3]503 U.S. 60 (1992).

[4]477 U.S. 57 (1986).

[5]42 U.S.C. § 2000e (1994).

[6]Petitioner's view is that, because *Franklin* is not a "quid quo pro" harassment case, then, of course, it must be a "hostile environment" case. This analysis begs the question of how much, if any, of the traditional Title

decide whether Title VII principles should apply in a Title IX damages suit.[7] *Rowinsky* does not conflict with *Franklin.*

Nor does the Fifth Circuit's decision conflict with the other decisions cited by Petitioner. In *Cannon v. University of Chicago*,[8] an admissions policy case, the Court held that Title IX is enforceable through an implied private right of action. In *North Haven Board of Education v. Bell*,[9] the Court determined that school employees are "persons" protected by Title IX[10] and that, therefore, the U.S. Department of Education had authority under 20 U.S.C. §1682 to promulgate regulations pertaining to school employment practices. Neither opinion discusses sexual harassment, damages claims, or the standard of liability for the acts of agents or non-agents.

II. The circuit courts are not in conflict on the issue of whether institutions may be held liable for the harassing acts of non-agents.

Petitioner asserts that the federal appellate courts are in "substantial conflict" on the issue of "peer sexual harassment." (Pet. at 17.) Given that the Supreme Court did not even recognize a damages claim under Title IX until the *Franklin*

VII analysis applies to Title IX claims.

[7] *Franklin*, 503 U.S. at 65 n. 4.

[8] 441 U.S. 677 (1979).

[9] 456 U.S. 512 (1982).

[10] Title IX states in part: "No *person* in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (1988) (emphasis added).

case in 1992, such claims are only now beginning to surface in the circuit courts. Only one case cited by Petitioner actually conflicts with *Rowinsky*. That decision, *Davis v. Monroe County Board of Education*,[11] was vacated on August 1, 1996, upon the granting of the school district's petition for rehearing en banc. Thus, the conflict no longer exists.

The remaining cases cited by Petitioner present no conflict. Indeed, the Tenth Circuit decision *Seamons v. Snow*[12] actually complements *Rowinsky*. In *Seamons*, a football player named Brian was subjected to a sexually explicit hazing incident by other football players. Football season was later cancelled, which increased student hostility toward Brian. He alleged that the District's response to the "hostile environment" was based on the male stereotype that he should have taken the abuse "like a man." As Amici note, although *Seamons* cited the now vacated *Davis* decision, the Tenth Circuit approached the case the way the Fifth Circuit approached *Rowinsky*, ultimately rejecting Brian's claim because he failed to show that the school officials' conduct was based on his sex. The court noted that Brian did not allege that the school district would have acted differently "if a similar event had occurred in the women's athletic program." The court specifically declined to decide "what liability, if any, the school district might have for the acts of its students" or whether negligence would be a sufficient basis on which to impose liability.[13]

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[11]74 F.3d 1186, *vacated*, No. 94-9121, 1996 WL 438188 (en banc) (11th Cir. Aug. 1, 1996).

[12]84 F.3d 1226 (10th Cir. 1996).

[13]*Id.* at 1332 n.7.

The remaining cases cited by Petitioner are either inapplicable or distinguishable. The First Circuit case[14] is factually dissimilar, having involved a mandatory *school-sponsored* assembly on AIDS awareness that contained sexually explicit skits. Further, although the court recognized the concept of a school-created "hostile environment," the court found the allegations insufficient to state a claim.

The Second Circuit case[15] involved an adult dental student who allegedly was harassed by a patient at the clinic where she worked. The Second Circuit declined to decide whether an entity that fails to prevent harassment by a non-agent may be held liable under either Title VII or Title IX.[16] Rather, the court determined that, even if the standard did apply, the dental student's complaint would fail.

The Ninth Circuit decision cited by Petitioner, *Clyde K. v. Puyallup School District*,[17] is not even a Title IX case. *Clyde* involved a student with Tourette's Syndrome who used sexually explicit remarks at school. In determining the proper placement for the student under the federal law pertaining to disabled

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[14]*Brown v. Hot, Sexy, and Safer Productions Inc.*, 68 F.3d 525 (1st Cir. 1995), *cert. denied*, 116 S.Ct. 1044 (1996). The First Circuit also decided *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988), which involved a medical school resident employed at a hospital. The circuit court recognized a Title IX "hostile environment" claim but emphasized that its holding was limited to the employment context and observed that the action was limited to declaratory and injunctive relief. *Id.* at 884 n.3, 897.

[15]*Murray v. New York Univ. College of Dentistry*, 57 F.3d 243 (2d Cir. 1995).

[16]*Id.* at 250.

[17]35 F.3d 1396 (9th Cir. 1994).

children,[18] the court observed, in dicta, that it was appropriate for school officials to consider the effect of Clyde's remarks upon others and to consider possible liability.

In short, with the exception of the vacated *Davis* decision, none of the circuit cases cited by Petitioner conflicts with the Fifth Circuit decision. The Respondent acknowledges that, at the district court level, some courts agree with the *Rowinsky* approach and some disagree with it. As stated above, however, Title IX damages claims are only now surfacing in the circuit courts. The existence of disagreement in the district courts does not merit granting the Petition.

III. *Rowinsky* is consistent with this Court's prior treatment of claims based on violations of Spending Clause statutes; therefore, the decision presents no issues requiring correction by the Court.

Rowinsky is consistent with prior decisions of this Court concerning remedies for violations of a Spending Clause statute. In contrast, Petitioner's negligence proposal, which would permit damages claims against schools that fail to prevent students from harassing each other, is inconsistent with this Court's Spending Clause jurisprudence. The Spending Clause enables Congress to place conditions on the receipt of federal dollars by grantees.[19] The legitimacy of the power is the *voluntary* and *knowing* acceptance of the conditions by the grantee.[20]

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[18]Individuals with Disabilities Education Act, 20 U.S.C. § 1401 (1988).

[19]*See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

[20]451 U.S. at 17.

Although the Court in *Franklin* reserved the issue of whether Title IX was enacted under the Spending Clause,[21] because Title IX is patterned after the anti-race discrimination statute Title VI and is similarly construed,[22] and because Title VI was enacted pursuant to the Spending Clause,[23] lower courts have presumed that Title IX is a Spending Clause statute.[24]

Franklin's treatment of damages claims under Title IX was based largely on the Title VI case *Guardians Association v. Civil Service Commission of New York*,[25] a case decided without a majority opinion. *Guardians* involved an employment test that had a disproportionate impact on racial minorities, which a majority of justices viewed as unintentional discrimination for which no damages could be had. "In this and similar situations," Justice White wrote, "it is not immediately obvious what the grantee's obligations were and it is surely not obvious that the grantee was aware that it was administering the program in violation of the statute or regulations."[26]

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[21]503 U.S. at 75 n.8.

[22]*See Cannon v. Univ. of Chicago*, 441 U.S. 677, 694-95 (1979).

[23]*See Guardians Ass'n v. Civil Service Comm'n of N.Y.*, 463 U.S. 582, 598-599 (1983).

[24]*See Rowinsky*, 80 F.3d at 1012 n.14; *Doe v. Petaluma City School Dist.*, 830 F.Supp. 1560, 1574 n.9 (N.D. Calif. 1993); *Franklin v. Gwinnett County Pub. Schs.*, 911 F.2d 617, 622 (11th Cir. 1990), *rev'd on other grounds*, 503 U.S. 60 (1992).

[25]463 U.S. 582 (1983).

[26]463 U.S. at 598. Likewise, *Franklin* states that damages are unavailable in cases of "unintentional" discrimination because the entity lacks notice that it will be held monetarily liable. 503 U.S. at 74.

In the Bryan ISD's case, it surely was not "obvious" that the district in 1992-93 was administering its student disciplinary rules in a manner that violated Title IX. Neither Title IX nor its regulations define or even mention sexual harassment or student discipline. *See* text, *infra*, at 20-21. The regulations that do exist concern athletics, admission, housing, and the like. *See* 34 C.F.R. §§ 106.1-106.61. Further, the regulations are devoted to acts by the grantees in administering those programs. Likewise, the legislative history of Title IX shows that both supporters and opponents focused exclusively on the acts of grant recipients.[27] The opinions in *Guardians, Cannon, Pennhurst,* and other Spending Clause cases have focused on the policies and actions of the grant recipient itself.

Petitioner's proposal to eliminate the requirement of intentional discrimination by the grantee is inconsistent with this history. Petitioner's Title VII-style approach is particularly ill-suited to a Title IX implied cause of action because, unlike Title IX, Title VII is tempered by statutory provisions that protect the employer from far-reaching liability, the most important of which is a statutory ceiling on the amount of monetary damages that are recoverable.[28] Title IX contains *no* statutory restrictions on damages. In one recent Title IX teacher/student molestation case, the jury awarded the student $1.4 million, leading the district judge to enter a remittitur:

> [E]ven rich districts would be strapped by a verdict of $1.4 million. Certainly, the Congress did not intend for Title IX suits to bankrupt

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[27] *See Rowinsky*, 80 F.3d at 1013-14 (describing floor debates).

[28] *See* 42 U.S.C. § 1981a(b)(3) (1994).

> school districts...Everyone but a random plaintiff loses in such situations.[29]

Under Petitioner's analysis, financially strapped school districts would face greater exposure under Title IX than huge corporations face under Title VII. Petitioner seeks certiorari to press her request that the Court recognize a new Title IX damages cause of action, with a low threshold of proof, outside of the legislative process. This is not a proper basis on which to grant review.

IV. Petitioner's argument is based on fragile analogies to matters of law not yet decided by the circuit courts, thus granting the Petition would be premature.

To date, no circuit court has found an employer liable under Title VII for the acts of non-agents, and no circuit court has yet defined the standard of liability under Title IX in cases involving harassment by a school agent, such as the teacher/molester in *Franklin*. Given that Petitioner's argument is based on fragile analogies to propositions of law that have yet to be fully explored by the circuit courts, review by this Court is simply premature.

While Title IX and Title VII share a common prohibition against "sexual discrimination" and while, over time, some Title VII doctrines have been found to be useful in

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[29] *Leija v. Canutillo Indep. Sch. Dist.*, 887 F.Supp. 947, 955 (W.D. Tex. 1995); *see also Howard v. Board of Educ. Sycamore Dist.*, 876 F.Supp. 959, 974 (N.D. Ill. 1995) ("[I]t is difficult to imagine that Congress intended to open schools and educational agencies to virtually unlimited liability based on the conduct of their employees.").

certain Title IX cases,[30] the two statutes are substantively different.[31] As this Court explained in *North Haven* in comparing Title VI and Title IX, "For although two statutes may be similar in language and objective, we must not fail to give effect to the differences between them."[32]

One of the key differences between Title IX and Title VII, completely ignored by Petitioner and Amici, is that Title VII expressly defines "employer" to include the employer's "agents."[33] Consequently, courts have applied the common law rules of agency to Title VII claims, which led to the development of the negligence standard now advocated by

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[30]*See, e.g., Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 832 (10th Cir. 1993) (using Title VII "disparate impact" concept in case challenging discontinuation of women's softball program), *cert. denied*, 510 U.S. 1004 (1993); *Preston v. Commonwealth of Va.*, 31 F.3d 203, 206 (4th Cir. 1994) (using "mixed motive" concept in Title IX employment action).

[31]*See, e.g., Bougher v. Univ. of Pittsburgh*, 713 F.Supp. 139, 145 (W.D. Pa. 1989)(declining to "blandly blur the distinctions" between Title VII and Title IX and refusing "to transfer wholesale the EEOC guidelines into an area for which they were not drafted"), *aff'd on other grounds*, 882 F.2d 74 (3rd Cir. 1989); *Doe v. Petaluma City Sch. Dist.*, 830 F.Supp. 1560 (N.D. Calif. 1993) (concluding that Title IX's "prohibitions and remedies" are not co-extensive with Title VII's); *see also Franklin v. Gwinnett County Pub. Schools*, 911 F.2d 617, 622 (11th Cir. 1990)(concluding that application of Title VII law to Title IX cases was too "confusing"), *rev'd on other grounds*, 503 U.S. 60 (1992).

[32] 456 U.S. at 530.

[33]42 U.S.C. § 2000e(b)(1994); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) (stating that courts should look to common-law agency principles for evaluating employer liability under Title VII).

Petitioner.[34] In contrast, Title IX contains no "agency" provision, and, thus, there is no textual support for applying a Title VII-style analysis.[35]

Moreover, even under Title VII, it is not clearly established that employers may be held liable for the wrongful acts of non-agents. This Court has previously recognized that Title VII "primarily govern[s] relations between employees and their employer, not between employees and third parties."[36] Respondent has not found any circuit court decisions in which an employer under Title VII was found liable for harassment by non-agents.[37] Amici, however, assert that it is "beyond cavil"

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[34]*See generally Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1015-16 (8th Cir. 1988) (negligence standard applies in hostile environment case); *Hirschfield v. New Mexico Corrections Dep't.*, 916 F.2d 572, 577 (10th Cir. 1990) (negligence standard applies in hostile environment case).

[35]*See Howard*, 876 F.Supp. at 972-74 (rejecting Title VII agency analysis in Title IX harassment case); *Floyd v. Waiters*, 831 F.Supp. 867, 876 (M.D. Ga. 1993) (rejecting Title VII agency analysis in Title IX harassment case); *see generally* Schneider, "Sexual Harassment and Higher Education," 65 TEX. L. REV. 525, 568-571 (1987) (analyzing absence of agency provision in Title IX); *see also Alexander v. Yale Univ.*, 459 F.Supp. 1, 3 (D. Conn. 1977)("the concept of mere *respondeat superior* appears ill-adapted to the question of Title IX sex discrimination based on harassment incidents"), *aff'd*, 631 F.2d 178 (2nd Cir. 1980).

[36] *City of Los Angeles v. Manhart*, 435 U.S. 702, 718 n.33 (1978).

[37]The issue has been acknowledged in dictum. The Second Circuit in *Murray v. N.Y. College of Dentistry*, 57 F.3d 243, 250 (2d Cir. 1995), acknowledged that the EEOC has adopted a "non-binding" guideline on harassment caused by non-agents (see 29 C.F.R. § 1604.11(e)), but the court declined to decide the propriety of the regulation. In *Henson v. Dundee*, 682 F.2d 897, 910 (11th Cir. 1982), the Eleventh Circuit remarked that a work environment can be rendered offensive by supervisors, coworkers, "or even strangers." *Henson*, in turn, cited *EEOC v. Sage Realty*

that employers under Title VII may be held liable for failing to prevent harassment by non-agents. (Amici's Brief at 9-10.) Amici's only support for such a proposition is a small handful of district court decisions. Such cases have involved the harassing acts of an independent contractor doing business with the employer or, less frequently, of a paying customer.[38] The analogy is inapplicable to schools, which have no economic incentive whatsoever to tolerate student misconduct. In any event, the issues raised by Petitioner concerning non-agents have not been fairly considered by the lower courts, making review by this Court premature.

V. To date, the Department of Education has not promulgated a single regulation on sexual harassment.

Petitioner's and Amici's discussion on the Department of Education omits a critical fact that would certainly help the Court in evaluating whether certiorari should be granted: *the Department of Education has never promulgated any regulations on the issues of sexual harassment or peer harassment*. The Title IX regulations are completely silent.[39]

Corp., 507 F.Supp. 599 (S.D.N.Y. 1981), in which the female plaintiff--an office building attendant--was required to wear a sexually provocative "Bicentennial uniform" that prompted visitors to make vulgar jokes. The court held that the requirement constituted sexual discrimination and was not a bona fide occupational qualification.

[38]*See Rowinsky*, 80 F.3d at 1011 fn. 11(citing cases).

[39]*See* 34 C.F.R. §§ 106.1-106.61 (1995). Title VI's regulations also are silent on these issues. 34 C.F.R. §§ 100.1-100.13 (1995). In 1994, however, long after this lawsuit was filed, OCR adopted a non-binding Title VI "investigative guideline" on racial harassment by agents and non-agents. 59 Fed. Reg. 11448 (1994). No such guidelines exist under Title IX.

In 1981, OCR, an office within the Department of Education, issued a "policy memorandum" on sexual harassment that addressed solely the issue of harassment by school employees.[40] The 1981 policy statement left unresolved the issue of student-to-student harassment.[41]

Petitioner's argument that a conflicts exists is based on a July 1992 "letter finding" of a regional OCR office following an investigation of another school district. The letter stated that "if harassment is carried out by non-agent students, the institution may nevertheless be found in noncompliance with Title IX if it failed to respond adequately to actual or constructive notice of the harassment."[42] Of extremely recent vintage, this letter finding, and a subsequent April 1993 letter written after the events in this lawsuit transpired, is not a longstanding policy statement of the Department of Education. The informal findings were authored by regional OCR staff members in connection with specific investigations and are not accorded the same deference owed to agency-wide regulations.[43] Further, an OCR decision of "noncompliance" is

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[40]OCR Policy Memorandum from Antonio J. Califa, Director of Litigation, Enforcement, and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981) (cited in *Rowinsky*, 80 F.3d at 1015).

[41]*Id.* at 10.

[42]Letter of Findings by John E. Palomino, Regional Civil Rights Director, Region IV (July 24, 1992) (cited in *Davis*, 74 F.3d at 1192).

[43]*See generally Wolpaw v. Commissioner of Internal Revenue*, 47 F.3d 787, 791 (6th Cir. 1995) (case-specific interpretation taken in litigation obtains no deference); *Kelley v. EPA*, 15 F.3d 1100, 1108 (D.C. Cir. 1994)(deference to agency's interpretation as "prosecutor" was inappropriate); K. Davis, ADMINISTRATIVE LAW TREATISE 17 (3d ed. 1994) (level of deference depends on whether the rule was authored by the agency

irrelevant to the question of whether damages can be awarded in a lawsuit.[44] *Guardians* shows that noncompliance may be the result of unintentional discrimination, for which no damages may be had. Finally, agency expertise is not necessary at all to determine whether damages are available, "a function clearly within the purview of judicial competence."[45]

Amici also observe that certain regulations under Title IX, Section 504, and Title VI hold grant recipients responsible for the acts of non-recipients. (Amici's Brief at 13-14.) However, the regulations cited by Amici apply to business transactions and situations in which the recipient is contracting out for services. Such regulations merely echo this Court's admonishment that entities cannot avoid liability by delegating discriminatory programs to third parties.[46] They do not support Amici's proposition that schools are financially responsible for the random acts of teenagers.

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or merely a member or portion of the agency's staff).

[44] *Doe v. Petaluma City Sch. Dist.*, 830 F.Supp. 1560, 1573 (N.D. Cal. 1993) (OCR letter findings did not address what judicial remedies are available in Title IX action). The letters are written following investigations of specific schools, and their purpose is to compel voluntary compliance. *See Rowinsky*, 80 F.3d at 1015 (citation omitted).

[45] *Capitano v. Secretary of Health & Human Servs.*, 732 F.2d 1066, 1075 (2nd Cir. 1984); *Kelley*, 15 F.3d at 1107-09.

[46] *Manhart*, 435 U.S. at 718 n.33.

VI. Petitioner's concerns about discrimination against girls raises numerous issues of public policy; such concerns, however, must be resolved by Congress and the states, not by the Supreme Court.

Petitioner and Amici argue that sexual harassment of girls is an issue of national importance and that, as a result of *Rowinsky*, employees may have greater protection under Title VII than girls have under Title IX. Petitioner argues that this is inequitable. Title IX's perceived deficiencies, however, may not be cured by the courts. Congress, not this Court, should decide whether school districts should be subjected to potentially unlimited damages based on claims that students experienced harassment from fellow students. As this Court observed in *North Haven*, "policy considerations" are "for Congress to weigh, and we are not free to ignore the language and history of Title IX even if we were to disagree with the legislative choice."[47]

Here, the legislative choice of Congress, carefully outlined in the Fifth Circuit decision, prevents damages claims under Title IX in the absence of intentional discrimination by the grant recipient. Regardless of how hapless or insensitive Petitioner portrays the school administrators, she failed to raise an issue of material fact showing the influence of gender.[48]

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[47] 456 U.S. at 535 n.26.

[48] *Cf. Yusuf v. Vassar College*, 35 F.3d 709 (2nd Cir. 1994) (male student stated a claim when he alleged that he received a stiffer penalty for harassment of his roommate's girlfriend than the roommate received for assaulting the plaintiff); *Pfeiffer v. School Bd. for Marion Center Area*, 917 F.2d 779 (3rd Cir. 1990) (girl stated a claim by alleging that her dismissal from honor society for premarital sexual activity was discriminatory because similarly situated boy was not dismissed); *Ruh v. Samerjan*, 816 F.Supp. 1326, 1331 (E.D. Wisc. 1993) (plaintiff in teacher-student

This Court and the circuit courts in other contexts have shown a reluctance to hold public entities liable for the acts of non-agents. The circuit courts have rejected 42 U.S.C. § 1983 due process claims that were based on allegations that public school students were murdered, raped, or molested at school by fellow students.[49] This line of cases is based on this Court's decision in *DeShaney v. Winnebago County Department of Social Services*,[50] in which a state social worker negligently placed a boy with his abusive father, who battered the child nearly to the point of death. This Court held that the state social workers could not be held liable for failing to protect the child from private violence. In rejecting the claim, the Court observed

> Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation. But before yielding to that impulse, it is well to remember once again that the harm was

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harassment case failed to show that the university intentionally mishandled her complaints because of gender), *aff'd*, 32 F.3d 570 (7th Cir. 1994).

[49]*See, e.g., Graham v. Indep. Sch. Dist. No. I-89*, 22 F.3d 991 (10th Cir. 1994) (rejecting claim of parent of student murdered by another student known to be violent); *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732 (8th Cir. 1993) (rejecting claim of mentally retarded student who was raped in the showers by another student); *D.R. by L.R. v. Middlebucks Area Vocational Sch.*, 972 F.2d 1364, 1369 (3d Cir. 1992) (en banc) (rejecting claim of students who were molested by other students in classroom darkroom), *cert. denied*, 506 U.S. 1079 (1993); *Walton v. Alexander*, 44 F.3d 1297, 1305 (5th Cir. 1995) (en banc) (rejecting claim of student who was raped by a fellow student on two occasions).

[50]489 U.S. 189 (1988).

> inflicted not by the State..., but by Joshua's father. The most that can be said of the state functionaries ... is that they stood by and did nothing when suspicious circumstances dictated a more active role for them.[51]

Although *DeShaney* was not a Title IX case, it vividly demonstrates the principle that the legislatures, and not the judiciary, bear the burden of creating new duties "in accordance with the regular lawmaking process."[52]

VII. *Rowinsky* is consistent with this Court's prior decisions cautioning against federal interference with the implementation of school disciplinary rules.

The Supreme Court has long recognized that the federal courts should not micromanage the public schools or interfere with the implementation of disciplinary rules.[53] Absent evidence of illegal considerations, "[i]t is not the role of the federal courts to aside decisions of school administrators which the Court may view as lacking a basis in wisdom or compassion."[54]

"Peer harassment," whether sexual or not, is but one of many issues that school administrators must tackle with their limited resources. Unlike adults in the workplace, juveniles have limited life experiences or familial influences upon which to establish an understanding of behavior. In the school setting,

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[51] *Id.* at 202-03.

[52] *Id.* at 203.

[53] *See Bd. of Educ. v. McCluskey*, 458 U.S. 966 (1982); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

[54] *Wood v. Strickland*, 420 U.S. 308, 325 (1975).

punishment of students serves both a pedagogical and disciplinary function and is generally based on the student's age, credibility, and circumstances of the conduct. The Petitioners are asking the Court to define how much punishment is necessary to satisfy Title IX. Such an inquiry is not appropriate under Title IX, which, after all, is an anti-discrimination statute, not an all-purpose safety statute. Judicial involvement in this case appropriately ended upon a finding that the Petitioner failed to raise a genuine issue of material fact showing that the school district was influenced by gender in its handling of complaints. Congress did not mean for Title IX "to impair the independence" of schools in disciplining students.[55]

VIII. Granting the Petition would be futile because, even under Petitioner's theory, the Respondent would be entitled to summary judgment.

Even assuming *arguendo* that the Petitioner's theory had merit, the Court should not grant certiorari because the Petitioner failed to raise a genuine issue of material fact even under a Title VII-style analysis. Under Title VII, sexual harassment becomes actionable only when a *management-level* employee knew or should have known about severe and/or pervasive harassment and failed to take prompt, corrective action.[56] The alleged negligence of an hourly-wage school bus driver such as Bob Owens would not be imputed to an employer even under Title VII.[57] All three boys were

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[55] *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2nd Cir. 1994).

[56] *Hirschfield*, 916 F.2d at 577.

[57] *See generally Doe v. R.R. Donnelly & Sons Co.*, 42 F.3d 439, 446 (7th Cir. 1994) ("It would be unrealistic to expect management to be

disciplined. Further, after school officials replaced the bus driver, no further bus problems were reported. This response satisfies Title VII, even though Jane and Janet were dissatisfied with it. Thus, even if the Fifth Circuit applied the incorrect legal standard, the ultimate disposition of the motion for summary judgment would remain the same: it would be granted, and Petitioner's claim would be dismissed.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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Respectfully submitted,

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aware of every impropriety committed by every low-level employee.").